No. 3198

*IN THE*

# The United States Circuit Court of Appeals

## For the Ninth Circuit

---

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE its Treasurer,

*Plaintiffs in Error,*

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

*Defendant in Error.*

---

# Petition for Rehearing

---

Upon Writ of Error to the District Court of the United States for the District of Oregon



N. D. ELLIOTT, PRINTER, SALEM, ORE.

*IN THE*

# The United States Circuit Court of Appeals

## For the Ninth Circuit

---

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE its Treasurer,

*Plaintiffs in Error,*

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

*Defendant in Error.*

---

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

Wood, Montague, Hunt & Cookingham,
Yeon Building, Portland, Oregon, for the
Defendant in Error

B. W. Macy, Salem, Oregon,
Wm. P. Lord, Lewis Building, Portland, Oregon,
for the Plaintiffs in Error.

## PETITION FOR REHEARING

Comes now the Plaintiff in Error and most respectfully petitions the Court to set aside the decision made and filed in this cause on the 6th day of January, 1919, affirming the judgement of the Court below and grant a rehearing herein on the following grounds:

I

Error in said decision in holding that the City of Salem's franchise contract with the Water Company was entered into by the City in the exercise of its governmental powers, instead of its private and proprietary capacity.

II

Error in holding that the issues in this case consist of the governmental question of rate regulation, instead of the impairment of the City's contract.

III

Error in holding that the language of Section 4 of Ordinance No. 207, to-wit: "* * * but the Salem Water Company, its successors or assigns shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied," gave to the City of Salem power to lower or alter the hydrant rate prescribed.

IV

Error in holding that the Public Service Commission had or could acquire jurisdiction over the rate prescribed in the City of Salem's Franchise Hydrant Contract.

POINTS AND AUTHORITIES

I

Municipal corporations have a double character: one governmental, legislative or public; the other, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, particularly in cases relating to property * * * * *. * * In its proprietary or private character, the powers are conferred upon the municipality for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers and property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quo ad hoc as a private corporation * * * * *.

1 Dillon Mun, Corp. 5 Ed. Sec. 109
20 Am. & Eng. Enc. Law, 2 Ed. 1131.
Commissioners vs. Lucas, 93 U. S. 108-115.
Meriwether vs. Garrett, 102 U. S. 472-530.
New Orleans vs. New Orleans Water Company, 142 U. S. 79-91.
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1-10.
Covington vs. Kentucky, 173 U. S. 231-240.

Worcester vs. Worcester Street Railway Co., 196 U. S. 539-551.
Hunter vs. Pittsburg, 207 U. S. 161-179.
Safety Wire & Cable Co. vs. Baltimore, 66 Fed. 140-143.
Illinois Bank vs. Arkansas City, 76 Fed. 271-282.
Willis vs. Commissioners, 86 Fed. 872-876.
Commissioners vs. Geer, 108 Fed. 478-481.
City Water Company vs. Ottumwa, 120 Fed. 309-311.
Little Falls E. & W. Co. vs. Little Falls, 102 Fed. 663-664.
Davenport vs. Buffington, 97 Fed. 234-238.
Omaha Water Co. vs. Omaha, 147 Fed. 1-5.
Winona vs. Botzet, 169 Fed. 321-332-333.
Tuttle vs. Cedar Rapids, 176 Fed. 86-88
Wykes vs. City Water Co., 184 Fed. 752-756.
Southern Telephone Co. vs. Mobile, 162 Fed. 523-531.
Grogan vs. San Francisco, 18 Cal. 590-613.
Hill vs. Boston 122 Mass. 344-359.

II

If a municipality obtains its supply of water or light by a contract with a public service corporation, it acts in its so-called private and proprietary capacity, in negotiating and executing the contract, and in questions arising in performance of the contract the municipality should be treated in the same manner as a

private individual or corporation, and is subject to the same general rules of law, restrictions and responsibilities.

3 Dillon 5 Ed. Sec. 1303 P. 2134.
4 McQuillin Mun. Corp. Sec .1717.
Illinois Bank vs. Arkansas City 76 Fed. 271-282.
Little Falls E. & W. Co. vs. Little Falls 102 Fed. 663-664.
Wykes vs. City Water Co. 184 Fed. 752-756.
Omaha Water Co. vs. Omaha 147 Fed. 1-5.
Wichita Water Co. vs. Wichita 234 Fed. 415-420.
Denver vs. Hubbard 17 Col. App. 346-368.
Indianapolis vs. Gas Co. 66 Ind. 396-403.
Gosport vs. Pritchard 156 Ind. 400-406.
Reed vs. Anoka 85 Minn. 294-298.
Weller vs. Gadsden 141 Ala. 642-658.
Gadsden vs. Mitchell 145 Ala. 137-157.
Lackey vs. Water Co. 80 Ark. 108-125.
State vs. Water Co. 61 Kan. 547-561.

III

In determing the relative rights of the municipality and the grantee of a franchise, the nature of the ordinance must always be taken into consideration. It frequently has a dual character. A corporation organized to supply water or light frequently operates under an ordinance containing not only a grant of the privilege to lay its mains or erect its appliances in the public streets, but also an agreement by the company to furnish, and by the City to receive and pay for a

supply of water or light. An ordinance so framed, is both a grant of a franchise to use the City streets to carry out a public purpose, and a contract by the city for a supply of water or light; and in the application of the provisions of the ordinance to the rights of the municipality and of the company, those provisions which relate to the franchise must be distinguished from those which relate to the contractual obligation.

3 Dillon 5 Ed. Sec. 1304 P. 2145-2146.
State vs. Birmingham Water Co. 185 Ala. 388-402.
Wichita Water Co. vs. Wichita 234 Fed. 415-420.
Vincennes vs. Citizens Gas Co. 132 Ind. 114-121-122.
Kaukauna E. L. Co. vs. Kaukauna 114 Wis. 327-334.

IV

Section 4 of Ordinance No. 207, (page 10-11 of Transcript of Record) reads as follows:

> "The said Salem Water Company, their successors and assigns, shall not charge at any time, higher rates for water than is customarily allowed for water in towns or cities of like population of the Pacific Coast, but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. * * * * * * *."

The City of Salem had no power under any circumstances at any time to lower that rate without the consent of the Water Company.

Detroit vs. Detroit Street Ry. Co. 184 U. S. 368-389

Cleveland vs. Cleveland Ry. Co. 194 U. S. 517-535-536.

Cleveland vs. Cleveland El. Ry. Co. 201 U. S. 529-539-540.

Vicksburg vs. Vicksburg Water Co. 206 U. S. 496-516.

Omaha Water Co. vs. Omaha, 147 Fed. 1-5.

Birmingham Water Co. vs. Birmingham, 211 Fed. 497-501-510.

Atlantic Coast Ry. Co. vs. Public Utility Board, 89 N. J. L. 407-413.

V

The City's franchise contract with the Water Company is protected from impairment by the Federal Constitution.

Grand Trunk Ry. vs. South Bend 227 U. S. 544-556-558.

VI

The Public Service Commission of Oregon is a quasi Judicial Body created by statute. It has only such powers as are expressly conferred upon it by statute. Its powers are strictly construed. Nothing is presumed in its favor.

Commissioners vs. O. R. & N. Co. 17 Ore. 65-75.
State vs. Corvallis & Eastern Ry. 59 Ore. 450-467.
City of Augusta vs. Lewiston A. W. St. Ry. Co. 114 Me. 24.
Public Service Com. vs. I. C. Ry. 274 Ill. 41.

VII

The Public Utilities Act of Oregon expressly withholds jurisdiction over the City of Salem's and similar contracts from the Public Service Commission. That portion of the Public Utilities Act in question is a portion of Section 63 of Chapter 279 of the General Laws of Oregon for 1911. In so far as it is applicable to the instant case, it reads:

> "Nothing herein shall prevent * * * the furnishing * * * * of water * * * * free or at reduced rates for the United States, the State or any municipality thereof, * *. (It will be found more fully set forth on page 36 of the Transcript of Record.)

VIII

Section 2 of Chapter 80 of the 1911 Session Laws expressly clinches and ties up Salem's Contract. (It will be found fully set forth on page 35 of the Transcript of Record.)

## ARGUMENT

We will first analyze the several cases cited by the Court in its opinion herein. We are of the opinion that in none of those cases, are the facts analagous to the case at bar. If this be true, then they are poor precedents in this case. As was said in the case of Home Telephone Co. vs. Los Angeles, 211 U. S. 265: "It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another * * * *." Page 274. With this in mind we will proceed.

Hunter vs. Pittsburg, 207 U. S. 161. There was no issue in that case concerning any contract entered into by Pittsburg, or by the City of Allegheny, in any capacity. Simply the legislative or governmental power of the Legislature to consolidate two contiguous cities. The statements made by the Court in that case, which are quoted in the opinion herein, all refer to the governmental powers conferred upon a municipality. Pages 178-9.

Portland vs. Public Service Commission, Or, 173 Pac. 1178. The only issue in this case was the power of the Commission to regulate the rate of fare charged its patrons by the street car company, when the franchise granted by the City limited the fare to not more than 5 cents. The city was exercising a delegated governmental power, when it granted the franchise and limited the rate of fare. No issue was raised

and no question was presented which involved any charges for services rendered the City of Portland by contract or otherwise.

Woodburn vs. Public Service Commission, 82 Or. 114. This case is similar to the Portland "6 cent fare" case, 173 Pac. supra. It was simply the governmental power to regulate the rates charged by the Telephone company for services rendered its patrons. No issue was raised concerning any charges made to the City of Woodburn under a contract, or otherwise. On page 120, Judge Harris in particularly calling attention to the distinction to be observed in dealing with the rights of a municipality, uses this language: "Throughout the discussion it must be borne in mind that the State, acting through the Public Srvice Commission, is a party to this suit, and consequently judicial precedents arising out of controversies between none but the immediate parties to a franchise are not controlling here." We wish to state that we do not now, and never did question the correctness of the decisions in the Portland 6 cent fare case and Woodburn Telephone case, Supra.

Worcester vs. Worcester St. Ry. Co. 196 U. S. .196. There is a big distinction between the facts in this case and the instant case. In this case, all rights of the Street railway company were derived from and all obligations were imposed by a General Statute of the State of Massachusetts. None whatever from the Charter or an Ordinance of the City of Worcester.

The Board of Aldermen of the City of Worcester had to act under the authority of a State Statute before the Street railway company could acquire any rights in the street. (Page 540-541) Section 32 of Chap. 113 of the Massachusetts Public Statutes made it the duty of every Street Railway company to pave and keep in repair the portion of the street occupied by their tracks, and if an unpaved street, for 18 inches on each side of their tracks. (page 541) This was a statutory obligation. No suggestion of any contractual obligation due the city of Worcester. The order of May 11th, 1891, granting an extension to the Street railway and requiring that block paving shall be laid between the rails and for a distance of 18 inches on the outside of the rails, and in some instances, clear to the curb, was made without any authority on the part of the Board to require paving outside of the rails. (page 541) In 1898, the Massachusetts legislature, by general statute, made provision for a different system of Taxation whereby street railway companies were relieved of their obligation to keep a portion of the street in repair. (Page 542) But they were to remain subject to all legal obligations imposed in the original grants of their locations. (Page 542) Still no suggestion of any contractual obligation due the City of Worcester in any capacity. The Board of Aldermen, in making those grants and extensions, were not acting for the City of Worcester in its proprietary capacity, or by virtue of any power conferred upon the City, or contained in its charter. They were

acting as agents of the State under a general statute, exercising delegated governmental powers. Even if they were municipal officers, they were acting in their governmental capacity. Nothing in this case concerning the price fixed by contract to be paid by the City of Worcester to the street railway company for service rendered by it to the City.

New Orleans vs. New Orleans Water Co. 142 U. S. 79. The facts in this case are very similar to those in the Worcester Street Ry. case, supra. The Water company was incroporated by an act of the legislature. This act gave the Water company a franchise in the streets of New Orleans for 50 years, prescribed the terms and condition of such use of the streets, and prescribed the term' and conditions upon which the company should furnish water to the city. The alleged contract in issue in this case was not entered into by the city at all. It was a legislative contract, so-called, made for the city by the legislature, and was void. Nothing at all like the facts in the instant case.

Home Telephone Co. vs. Los Angeles, 211 U. S. 265. This was a case brought by the Telephone Co. to restrain the enforcement of a city ordinance enacted under delegated authority, fixing the rates to be charged its patrons for service by the telephone company. (Page 270) No issue was raised and no question was presented concerning the price the city had contracted to pay for services rendered to it by the Telephone Company. Nothing but the governmental power to regulate rates was involved in this case.

Milwaukee Electric Ry. Co. vs. Railroad Commissioners, 238 U. S. 174. About the only difference between this case and the Portland 6 cent fare case 173 Pac. 1178 supra, is that in this case the fares were lowered, instead of raised as in that case. The only question here involved was the governmental power to regulate rates. Nothing whatever concerning any contract for services to be rendered to the city of Milwaukee.

In the Brief on the original argument of this case, the City was endeavoring to prevail on several theories. One was that the State had surrendered to the City by Charter granted in 1891, the power to regulate rates. The franchise to the water company having been granted under this charter, it was contended that the state's power to regulate rates was suspended during the life of the franchise. Suffice to say that this point is now abandoned. Another was that the Franchise granted the Water Company was a contract which could not be impaired by the Public Service Commission. These two theories were so blended in the brief as to be somewhat confusing. The issues in this case are as follows; the City of Salem granted a Franchise to the Water Company and prescribed the terms and conditions upon which the company could occupy the streets and public places with its water mains, and in the franchise the city contracted for water for its hydrants at not more than $1.82 per month per hydrant. We maintain that the hydrants contract was entered into by the city in its private and proprietary capacity, and

the Public Service Commission did not have and can not acquire, neither can it have conferred upon it, jurisdiction to impair this contract.

That a city acts in two different capacities, one governmental the other private proprietary, can not be denied. The United States Supreme Court, the various Federal Courts and the different state courts have iterated and reiterated this fact time and again, and there is no dissent or conflict of authority. To dwell upon this point is like trying to prove by an elaborate demonstration, that 2 and 2 make 4.

When a city obtains its supply of water or light by a contract with a public service corporation, it acts in its private and proprietary capacity in negotiating and executing the contract, and in questions arising in the performance of the contract the city should be treated in the same manner as a private individual or corporation. We have cited many cases in support of this statement of the law, but not all of them. There is no dissent nor conflict of authority on this point. To deny that this is the law is to shut one's eyes and maintain that one is blind. What does it mean? What would happen should the state or any of its agencies undertake to impair a contract entered into between two private corporations or two individuals? The Federal Courts would interfere to protect it in a hurry. Then the city of Salem's contract with the Water Company for water for its hydrants should receive the same treatment by this or any other Federal

Court. To say that the city's contract for hydrant service is not of a private proprietary nature, and to aver that it is governmental, is contrary to the holding of every Federal and State Court that has passed upon the point, and is out of harmony with all the enclycopedias and all the text writers who have discussed the point. If the statement of the law under paragraph II of Points and Authorities does not mean that the City of Salem's contract for water is protected by the Federal constitution, then we can not depend upon any statement of the law, no matter in how plain and simple English it may be couched. While the Supreme Court of the United States has not passed directly upon this point, it has repeatedly and upon numerous occassions abstractly affirmed the rule. If the City of Salem's hydrant contract does not come within the rule in question, then it will be impossible to find a case that does. The rule is an empty, useless, meaningless jumble of words. To deny that it is protected by the Federal Guarantees, is to deny the meaning of language of plain import.

Discussing the reason for the rule, Judge Dillon says: "The distinction originated with the Courts to promote justice, * * *. The distinction however, is generally recognized, and it may be invoked as the basis of property rights in favor of the municipality which are not wholly with-drawn from the protection that our constitutions extend to property. This distinction, whatever may be its rationale, is firmly established within the limits shown by the

adjuged cases. It is at the bottom, as we think, judicial legislation imperceptibly evolved in the process of adjudication, but its necessity in order to promote justice, and its salutary operation as applied by the conservatism and intelligence of the Courts, has fully justified its wisdom. It is the law of the land." 1 Dillon Mun. Corp. 5 Ed. Sec. 110 P. 184.

The frequency and regularity with which the United States Supreme Court cites with approval, Judge Dillon's work on Municipal Corporations, places upon it the stamp of supreme judicial authority.

That a city's control over the streets is a governmental function, is undoubted. All authorities and text writers concede this. In granting a franchise for the use of its streets and prescribeing the terms and conditions upon which the streets may be occupied, the city is exercising delegated governmental powers. When it contracts for a supply of water for its own use, or light for lighting its streets, it is exercising its business powers. These two powers are frequently joined in one ordinance. This fact is sometimes confusing. It is a well known fact, which is indisputable, that a State exercises its private business powers when it enters into a contract for water or light for its public buildings and grounds; when it contracts for supplies for its public institutions. Those functions are not legislative or governmental. Who would have the temerity to try to maintain that the Public Service Commission had power and authority to raise or lower

the contract rate against the opposition of either the state or the other party to the contract? Most assuredly it can not impair a City's contract under the same circumstances.

In the case of Kaukauna E. L. Co. vs. Kaukauna, 114 Wis. 327-333-4, the Court said: The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this State, where the City acts in a two-fold capacity. First, as a governmental body exercising delegated power of the State, it confers, and limits with conditions, the privilege or franchise to use the public streets, * * * *. In addition to this function as an agent of the State, the City, in the same instrument or ordinance, exercices its function as a business corporation, with power to purchase, contract for, and pay for electric lights for public purposes, and to specify the conditions of such contracting, a power arising under its own charter." The dual character of a franchise ordinance so lucidly set forth in the above quotation states the condition of most franchise ordinances. The franchise in which the City of Salem granted rights to the Salem Water Company and provided for a supply of water for its hydrants, is of exactly this type.

The City of Salem is not contending that it had authority to contract away the power of regulation, either in the express words of the ordinance or by implication from its terms. Sec. 4 of Ord. No. 207

which is the franchise ordinance in question, reads as follows: "The said Salem Water Company, their successors or assigns, shall not charge, at any time, higher rates for water than is customarily allowed for water in towns or cites of like population on the Pacific Coast but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the City of Salem to continue or discontinue, to connect or disconnect any or all hydrants or cisterns connected, or which may hereafter be connected, with said works; and the City of Salem shall not pay for said hydrants or cisterns, while the same are disconnected or discontinued." By the plain language of this Section there is no attempt, nor is any reserved, to regulate any sort or kind of rates or service, except the rather nebulous one which states that the Water Company shall not charge at any time, higher rates for water than is customarily allowed in towns or cities of like population on the Pacific Coast. This is so indefinite it would be uninforcible as a regulation. While the City of Salem did not surrender all right of fixing terms on which the Water Company could use its streets, for the reason that this is a governmental power, it did make a irrevocable contract with the Water Company for water at not to exceed one dollar and eighty-two cents ($1.82) per hydrant per month. This left no power in the City of Salem to reduce it below that figure without the consent of the Water

Company. This question has been repeatedly passed upon by the United States Supreme Court and by other courts. In the case of Detroit vs. Detroit Street Railway Company, 184 U. S. 368-389, a franchise was granted to the Street Car Company which contained a provision that the rate of fare for a single trip shall not exceed five cents (5ct.) for any distance within the City limits. The City contended that this gave it power to reduce fares below that figure. In construing that portion of the franchise the Court said: "Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than 5 cents, give any right to the City to reduce it below the rate of 5cts. established by the Company. It is a contract which gives the Company the right to charge a rate of fare up to the sum of 5 cts. for a single passenger, and leaves no power to the City to reduce it without the consent of the Company."

In the case of the Atlantic Coast Railway Co. vs. Public Utilities Commission, 89 N. J. L. 407-413, in construing a similar provision the Court said: "But it is contended that the ordinance does not in fact entitle the Company to charge a 5ct. fare. We see no merit in this contention. The great weight of authority is that an ordinance which provides, as does the one in question, that no more than 5cts. shall be charged, gives the Company a contract right to charge a 5ct. rate, which rate cannot be reduced without the consent of the Company." And so it is in the City of Salem's case. Section 4 of Ordinance No 207 gave the Water

Company an absolute right to charge the City of Salem one dollar and eighty-two cents ($1.82) per hydrant per month, and left no power in the City to reduce it below that rate without the consent of the Water Company. It was a binding contract made by the City in the exercise of its private and proprietary powers.

That the Public Service Commission of Oregon has only such powers as are expressly conferred upon it by the statute creating it, and that its powers are strictly constructed, cannot be denied. At any rate, that is the rule in this state. A number of years ago there was a so-called Railroad Commission in this State whose powers were rather uncertain, owing to the ambiguous language of the act creating it. In the case of Railroad Commissions vs. O. R. N. Co. 17 Ore. 65-75-77, it was contended that some of the ambiguous features of the act creating the board were intended to give it rather broad powers. In discussing this feature of the act Mr. Chief Justice Thayer, on page 75 said: "The first question arising would be, what contention between the Railroad Company and such persons, firms, etc., has it jurisdiction of? The answer to that question cannot be left to speculation. The jurisdiction of such Commissions is not given by implication. Commissions of that character are mere creatures of statute, and possess no power except what the statute expressly confers upon them." Again on page 77 he further observes: "It has for a long time been considered the safer and better rule, in determining questions of juris-

diction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. * * * * It is not, it seems to me, requiring too much of the legislative branch of the Government to exact, when it creates a Commission and clothes it with important functions, that it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent."

In the case of State vs. C. & E. Railway Co. 59 Ore. 450-466-467, in considering the powers of the present Commission Mr. Justice Moore quotes with approval the language of Chief Justice Thayer hereinbefore set forth. These cases expressly show the view the Courts of this State take of the powers of the Public Service Commission.

Examining the Public Utilities Act (Chapter 279, 1911 Session Laws) in the light of these decisions, let us observe what powers are conferred upon the Commission. Sec 25 reads as follows: "(Rate Schedules to Be Filed; Maximum Charges.) Every public utility shall file with the Commission within a time to be fixed by the Commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the State, or for any service in connection therewith performed by any public utility controlled or operated by it. The

rates, tolls and charges shown on such schedules shall not exceed the rates, tolls, and charges in force January 1, 1911." Only rates, tolls and charges fixed and established by the utility are here mentioned. No suggestion whatever of contractual obligations.

Sec. 43 reads as follows: "(Commission to Prescribe Reasonable Rates and Regulations.) If, upon such investigation, any rates, tolls, charges, schedules or joint rates, shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, the Commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable. * * * *." Again we find only rates, tolls, charges or joint rates mentioned in this Section. Nothing whatever concerning contractual obligations.

Sec. 51 reads as follows: "(Commission to Order Substitution of Reasonable Rates and Service, Taking Effect of Order.) Whenever, upon an investigation made under the provisions of this Act, the Commission shall find any existing rate or rates, or any schedule of rates, tolls, charges, joint rate or joint rates, to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, the Commission shall determine and by order fix reasonable rate or rates, schedule or rates, tolls, charges or joint rates to be imposed, observed and followed in the future in lieu of

those found to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this Act." Nothing different is brought within the jurisdiction of the Commission here. Sec. 61 of the Act in defining the powers of municipalities to regulate utilities, only refers to the product or service to be rendered by the utility within the municipality. Nothing concerning rates, tolls and charges. Neither does it mention anything concerning a contract between the municipality and the utility concerning services to be rendered to the municipality in its private and proprietary capacity.

In Sec. 63 among other things, we find this provision: "Nothing herein shall prevent the furnishing of water free or at reduced raes for the United States, the State or any municipality thereof."

Bearing in mind the fact that the Commission has only such powers as were expressly conferred upon it, one can search the Public Utilty Act from beginning to end and find no place where the legislature as inferentially, much less expressly, conferred upon the Public Service Commission, jurisdiction over contracts of municipalities made in the exercise of their private and proprietary powers. Not only is this true, but in Section 63 we have a provision which expressly denies to the Commission jurisdiction over free or reduced rates granted to municipalities. If the Commission viewed the City of Salem's contract with the Water Company

as a reduced rate, this provision in Section 63 expressly deprived it of jurisdiction over the contract rate.

While the statutes of the State of Oregon have expressly deprived the Public Service Commission of jurisdiction over the City of Salem's hydrant contract with the Water Company, it could not have conferred such jurisdiction on the Commission had it sought to do so, for the reason that the contract for water for hydrants was made by the City in the exercise of its private and proprietary powers and is governed by the same rules of law that govern the contracts of private corporations and individuals. At the time the Public Utilities Act was passed, this hydrant contract was an executed contract, and had been for years. Hence, it would have been just as impossible for the legislature to have conferred upon the Public Service Commission power and authority to impair the City's contract, as it would have been to have undertaken to impair the obligation of any other executed contract then existing within the State of Oregon.

Jurisdiction over the City's hydrant contract cannot be conferred upon the Public Service Commission by consent, agreement or waiver of the parties. The rule concerning jurisdiction is concisely stated in 15 C. J. 802, as follows: "It is not within the power of litigants to invest a Court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the Court has not jurisdiction of the cause of action or subject matter

involved in a particular case, such jurisdiction cannot be conferred by consent, agreement or waiver." The rule just stated prevails in this State. In the case of Wong Sing vs. Independence, 47 Ore. 231-234, Mr. Justice Moore says: "Jurisdiction of the subject matter of actions depends for its exercise upon a valid grant of power, evidenced by proper legislative enactment. The parties to actions may waive their own rights and confer jurisdiction of their persons by a voluntary appearance , but they are powerless to confer upon any tribunal jurisdiction of an appeal, (the subject matter) because the right to do so is not vested in them." In the case of Catlin vs. Jones, 56 Ore. 492-494, the Court observes: "The plaintiff's counsel were undoubtedly aware of the service on them of the notice of appeal, and, if jurisdiction of the subject-matter could be bestowed on this court by consent, their application for an extension of time to file a brief, in case the motion were denied, and the written consent of defendant's counsel to the request, might have waived the defect of filing a mere copy of the notice of appeal, without any proof of service indorsed thereon. Although jurisdiction of the person might be conferred by acquiescence, that of the subject-matter cannot." These cases show the rule laid down by the Courts of this State.

The case of City of Augusta vs. Street Railway Co. 114 Me. 24-27-28 is a case in many respects like the one at bar. The Public Utilities law of Maine provides that bridges erected by municipalities over which any street railroad passes, shall be constructed and main-

tained in such manner and condition, as to safety, as the Board of Railroad Commissioners may determine. It might require city and street railroads officers to attend a hearing after proper notice to the interested parties. After such hearing, the Commissioners were empowered to determine the repairs, renewals, or strengthening of parts of the bridge, or if necessary, the rebuilding of such bridge, and to determine who should bear the expense of such repairs, renewals, strengthening or rebuilding, or they might apportion such expense between the railroad company and the city. The City of Augusta and the Street Railway Company agreed that a certain bridge needed strengthening and repairing and agreed as to the manner of making such repairs and that the City was to pay the expense in the first instance and the proportion to be paid by each was to be thereafter determined. Being unable to come to an agreement over a just distribution of the costs, the City filed a complaint with the Public Utilities Commission asking the Commission to make such an apportionment of the expenses for the repairs, renewals and strengthening of parts already made, and for such further repairs, renewals or strengthening of parts , as may be ordered, as it shall deem just and fair.

The Commission decided that they had no jurisdiction to apportion the expense of repairs, renewals and strengthening of the bridge already made by agreement of the parties, and for this reason dismissed the petition, and the City of Augusta appealed to the Supreme Judicial Court of that State. The Court said: "We

think the ruling of the Commission was right, The jurisdiction of the Commission is created by a statute. It is limited by statute. The Commission has just the kind and extent of jurisdiction which the statute gives, and no more. * * * * If the parties agree upon repairs, and make all that are necessary, there is no occasion for the Commission to exercise its jurisdiction." The Court further says: "It is argued that the parties may waive preliminary determination, and still call on the Commission for an apportionment. Not so. That would in effect invest the Commission with a power which the statute has not conferred upon it. That cannot be done."

The holding of that case is to the effect that the Public Utilities Commission of Maine had no jurisdiction over a contract made by a city and a public utility, for the reason that the statute creating the Commission had not conferred upon it any such jurisdiction. Further, that such jurisdiction could not be conferred upon the Commission by consent or waiver of either or both parties to the contract. The holding of the Court in that case is directly applicable to the facts in the case at bar, with this difference. The Oregon Commission assumed jurisdiction, where the Maine Commission refused to do so.

The City of Salem is not estopped to deny the jurisdiction of the Public Service Commission over its hydrant contract. 15 C. J. 908 states the rule as follows: "Jurisdiction of the subject-matter cannot be based

on an estoppel of a party to deny it exists * * * ." Hence, the City of Salem is not estopped to question the determination of the Public Service Commission by reason of having adopted and filed resolurtion No. 1294.

It must be borne in mind that the State did not act in this case. It was merely the Public Service Commission upon whom the State had conferred limited powers. It had no jurisdiction beyond those conferred upon it. To contend that the City could agree that the State through the Commission and the Water Company could consent to the modification of the terms of the contract with respect to rates to be charged and paid, is to state a proposition that cannot be maintained, for the reason that it is erroneous, in that it assumes that jurisdiction over the City's hydrant contract, (the subject-matter)could be conferred upon the Public Service Commission by consent or agreement; a proposition no court in America has ever undertaken to maintain. To hold in this case that the City of Salem could consent or agree to the jurisdiction of the Public Service Commission over its hydrant contract, when such jurisdiction has not been conferred upon the Commission by the legislature of the State of Oregon, is not only to construe the legislative acts of this State contrary to the construction placed upon them by the Supreme Court of this State, which Federal Courts are bound to follow, but it is to hold contrary to every federal and state court in the land.

We do not ask the Court for any strained construction of the law nor any legal ledgerdermain; simply the plain language of the statuts as it is written and interpreted by the Courts of this State, and the law applied as it is found in the decisions of all jurisdictions of the United States. To restate the City's case—we have a contract made and entered into by the City in its private and proprietary capacity, under and by virtue of ample charter powers, which, according to the decisions of the Supreme and other Federal Courts, is within the protection of the Federal Constitution against impairment. This is the holding of all the authorities. There are none to the contrary. Our position upon this point is impregnable. Of course, if it be contended that Salem's hydrant contract was not made in the exercise of its private and proprietary powers, there is only one way to meet such a contention, and that is to use the language of Judge Moody in the case of Hunter vs. Pittsburg, 207 U. S. 161, where he said: "There is no way of answering such an argument, except by saying it is not true."

The Public Service Commission of Oregon did not have jurisdiction over the City of Salem's hydrant contract for the reason that it was a contract entered into by the City in its private and proprietary capacity, and was an executed contract years before the Public Utility Act was passed. Hence, had the legislature sought to do so, it would have been legally impossible for the legislature to have conferred upon the Public Service Commission jurisdiction over the contract.

It did not have jurisdiction for the further reason that the legislature did not attempt to confer jurisdiction upon it; and for the further reason that Section 63 of the Public Utilities Act expressly with-holds such jurisdiction from the Commission. The City of Salem could not by consent, agreement or waiver, confer jurisdiction upon the Commission, and is not estopped to deny the jurisdiction of the Commission.

The propositions above set forth are not only abundantly supported by the authorities cited, but by numerous others which the writer did not have time to collate. The law is not doubtful or uncertain. The legal path herein attempted to be pointed out has been travelled so often by the courts of our common country that it is as plain as the Oregon Trail across the Continent in the Fifties.

We feel that the opinion heretofore rendered in this case is erroneous for the reasons above set forth. Owing to the short time the writer has been able to give to this matter, there are many authorities which he was unable to bring to the attention of the Court. We think however, that we have cited sufficient to entitle us to a hearing where we can more fully present the City's case and thus avoid the disastrous effects of this erroneous decision.

Very respectfully submitted,

B. W. MACY

*Attorney for Plaintiff in Error.*